IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-8

J. B. O'CONNOR, M.D.,
Petitioner,

v.

KENNETH DONALDSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR AMICI CURIAE
AMERICAN ASSOCIATION ON MENTAL DEFICIENCY; AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, AFL-CIO; AMERICAN ORTHOPSYCHIATRIC ASSOCIATION; AMERICAN PSYCHOLOGICAL ASSOCIATION; JOSEPH P. KENNEDY, JR., FOUNDATION; NATIONAL ASSOCIATION FOR MENTAL HEALTH; NATIONAL ASSOCIATION FOR RETARDED CITIZENS; NATIONAL CENTER FOR LAW AND THE HANDICAPPED; NATIONAL SOCIETY FOR AUTISTIC CHILDREN

(List of counsel on inside cover)

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FRANCIS M. REES
RALPH J. MOORE, JR.
JOHN TOWNSEND REES
734 Fifteenth Street, N.W.
Washington, D.C. 20005

Attorneys for Amici Curiae

MARCIA PEARCE SOMMERS
1238 North Eddy Street
South Bend, Indiana 46617

Attorney for the National Center for Law and the Handicapped and the National Association for Retarded Citizens

JAMES F. FITZPATRICK
1250 Nineteenth Street, N.W.
Washington, D.C. 20036

Attorney for the American Psychological Association

ROBERT W. MELCHER
One Embarcadero Center
San Francisco, Calif. 94111

HARRY J. RUHEY
P.O. Box 72
York, Pennsylvania 17405

Attorneys for the National Association for Mental Health

SHERMAN L. KNIGHT
Munsey Building
Washington, D.C. 20004

Attorney for the National Society for Autistic Children

DOUGLAS ROWAN
1701 K Street, N.W.
Washington, D.C. 20006

Attorney for the Joseph P. Kennedy, Jr., Foundation

A. L. ZWERDLING
1211 Connecticut Avenue, N.W.
Washington, D.C. 20036

General Counsel, American Federation of State, County & Municipal Employees, AFL-CIO

Rees & Sommers
734 Fifteenth Street, N.W.
Washington, D.C. 20005

Of Counsel

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS—Continued

TABLE OF CITATIONS—Continued

TABLE OF CITATIONS—Continued

TABLE OF CITATIONS—Continued

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INTEREST OF AMICI CURIAE

This brief amicus curiae is filed, pursuant to consents filed with the Clerk, on behalf of the American Association on Mental Deficiency, the American Federation of State, County & Municipal Employees, AFL-CIO, the American Orthopsychiatric Association, the American Psychological Association, the Joseph P. Kennedy, Jr., Foundation, the National Association for Mental Health, the National Association for Retarded Citizens, the National Center for Law and the Handicapped, and the National Society for Autistic Children.

The amici include both professional and employee associations, representing the interests of institutional personnel, and "consumer" organizations, representing the interests of institutionalized persons and their families.[1]

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[1] The American Association on Mental Deficiency is an organization made up of over 9,000 professionals in the mental deficiency field, many of whom are employed in public facilities for the mentally retarded. The American Federation of State, County & Municipal Employees, AFL-CIO, is an employee organization representing approximately 1,250,000 public employees; among its 700,000 members, some 85,000 are mental health workers. The American Orthopsychiatric Association is an interdisciplinary association concerned with the problems of mental disorder and abnormal behavior. The American Psychological Association has a membership of approximately 40,000 psychologists, many of whom are employed in public mental hospitals. The Joseph P. Kennedy, Jr. Foundation is a private foundation concerned with all aspects of mental retardation, including improvement and promotion of the legal and human rights and welfare of retarded children and adults through support of medical, legal and ethical programs. The National Association for Mental Health is a voluntary citizens' organization with approximately one million members working for the prevention of mental illness and the promotion of mental health and the improvement of services for the mentally impaired. The National Association for Retarded Citizens is a voluntary organization with a membership of nearly 300,000 devoted to improving and promoting the welfare of mentally retarded children and adults. The National Center for Law and the Handicapped is jointly sponsored by the American Bar Association/Family Law Section, the Council for the Retarded of St. Joseph County (Indiana), the National Association for Retarded Citizens, and Notre Dame Uni-

Thus the amici represent interests on all sides of pending and potential litigation concerning institutional conditions and practices. Accordingly, they are interested not just in fair play for institutional employees *or* in decent institutional conditions and practices, but in both. Moreover, the amici are parties or otherwise involved in a number of important cases involving institutional conditions and practices that may be affected by what the Court does in this case.[2]

SUMMARY OF ARGUMENT

On the instructions given in this case, the jury was authorized to return a verdict for compensatory damages only if it found (a) that respondent Donaldson was in fact not dangerous to himself or others and that petitioner knew he was not, (b) that Donaldson, if mentally ill, was not receiving such treatment as would give him a "realistic opportunity to be cured or to improve his mental condition," and petitioner knew he was not, and (c) that petitioner nevertheless obstructed Donaldson's release. Such findings would render petitioner *prima facie* liable for damages, but the jury was further instructed to find in petitioner's favor if it found that petitioner "reasonably believed in good faith" that continued detention of Donaldson was lawful for *any* reason.

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versity/Notre Dame Law School, and is supported through joint funding by the Bureau of Education for the Handicapped, Office of Education, and the Division of Developmental Disabilities, Rehabilitative Services Administration, U.S. Department of HEW; it is devoted to securing the legal rights of handicapped persons and ensuring their full participation in the normal life of the community. The National Society for Autistic Children is a voluntary organization devoted to the education and welfare of citizens with severe developmental disorders of communication and behavior.

[2] *E.g.*, *Wyatt* v. *Stickney*, 325 F. Supp. 781, 334 F. Supp. 1341 (M.D. Ala. 1971), 344 F. Supp. 373 & 387 (M.D. Ala. 1972), *aff'd in part sub. nom. Wyatt* v. *Aderholt*, No. 72-2634 (5th Cir. Nov. 8, 1974). Local affiliates of the amici are engaged in many different cases across the country.

1. No substantial question is presented in this case relating to the rules of liability of public officials under § 1983. Petitioner does not contend that he is entitled to absolute official immunity. His contention that the decision below means that psychiatrists at state mental hospitals may be held liable for a state's inadequate provision of resources is not supported by the record in this case or any applicable law; petitioner was held liable for obstructing Donaldson's release, not for inadequacies in treatment that may have been caused by the State. Finally, petitioner was not unfairly found liable by the retrospective application of a new constitutional right; under the reasonable good faith belief instruction, petitioner need only have proved that he had had some reason which he reasonably believed to be lawful for blocking Donaldson's release. Not only did he fail, but he was found to have acted maliciously, wantonly or oppressively, as demonstrated by the award of punitive damages. Petitioner's arguments about fairness are principally arguments about the sufficiency of the evidence, which do not warrant review by this Court.

2(a). The Court should not assume that Donaldson would have been constitutionally confined if he had in fact been receiving adequate treatment. There is a substantial constitutional question whether an individual who is neither dangerous to others nor incompetent reasonably to care for himself may properly be continued in involuntary confinement for treatment because he is mentally ill. Such confinement is a massive curtailment of liberties and hence, under fundamental notions of due process, must serve compelling public purposes and restrict liberty no more than necessary to accomplish those purposes. The involuntary confinement of nondangerous individuals who do not lack the capacity reasonably to care for themselves meets neither test. The same conclusion is required as a matter of equal protection, if mentally ill but reasonably competent individuals are

required to submit to hospitalization for treatment while physically ill persons are permitted to decide such questions for themselves. This discrimination involves a "suspect class"—the mentally ill—and it cannot be justified by a sufficient governmental interest.

2(b). Amici strongly endorse the ruling of the court below on the right to treatment. Since Donaldson was committed for treatment but received none, his continued confinement violated the rule of *Jackson* v. *Indiana*, 406 U.S. 715 (1972): the nature of the confinement bore no reasonable relation to its purpose. In addition, however, amici believe that all persons who are civilly committed for mental impairments have a constitutional right to treatment, whether mentally ill or mentally retarded, and whether or not dangerous to others. Commitment without treatment is simply imprisonment for a mental impairment and therefore cannot be squared with Eighth Amendment principles embodied in the Fourteenth Amendment. Since the period of confinement may be indefinite, the allegedly dangerous mentally ill are discriminated against *vis-à-vis* dangerous persons who are not mentally ill, in violation of the Equal Protection Clause. Furthermore, involuntary confinement of the mentally ill violates the Due Process Clause unless treatment is provided to render the confinement nonpunitive, to ensure that the conditions of confinement are no more severe than necessary, and to ensure that the duration of confinement is no longer than necessary.

2(c). The constitutional right to treatment is susceptible to judicial definition and enforcement. Amici and others have been active for years in the establishment and administration of minimum professional standards for treatment. With the aid of published standards and expert opinion, courts can establish minimum requirements for institutional conditions on the one hand, and for the adequacy of individual treatment on the

other. Such review is an essential judicial function if the mentally ill and retarded are to be involuntarily confined; it will not put courts in the business of second-guessing the reasonable judgments of trained physicians and psychologists.

ARGUMENT

Petitioner claims that this case presents substantial issues to the Court. The first such issue is simply stated: whether patients involuntarily committed to a state hospital have a constitutional "right to treatment." The second, obscurely stated,[3] is presented as a substantial issue concerning the scope of liability for monetary damages on the part of mental health personnel at state mental institutions under R.S. § 1979, 42 U.S.C. § 1983 (1970), when patients are found to have been deprived of the aforementioned right.[4]

Amici strongly endorse the holding below on the "right to treatment," though we believe that respondent Donaldson may have been constitutionally entitled to release regardless of whether he was receiving the requisite treatment. In addition, amici believe that the award of damages in the case was made pursuant to unchallenged jury instructions that present no departure from the rulings of this Court, and that petitioner's remaining claims concerning his liability under § 1983 present no question warranting review by this Court. We set forth

[3] The issue is stated in the petition (p. 2) as follows: "Whether, assuming there is a constitutional right to treatment, staff members at a state mental hospital are liable for monetary damages in a suit under the civil rights act." Contrary to the appearance of this issue, petitioner does not argue for absolute official immunity. See Part I(B) *infra*.

[4] Petitioner also presents a third issue—whether respondent waived his right to treatment. Amici have little to add to respondent's discussion of that issue and therefore do not discuss it in this brief.

our views as to both matters below, beginning with the § 1983 issues because we believe them to be the narrower.

In what follows, we have generally relied on facts clearly of record and the factual part of the Court of Appeals opinion (493 F.2d 507, and App. 257), and have addressed the legal issues that those facts present. As to matters of fact that are in dispute, we refer the Court to the briefs of the parties.

I. The Monetary Award Against Petitioner Was Not Improper for Any Legal Reason Generally Applicable to Liability Under § 1983

A. *The Posture of the Case*

On the instructions given in this case, the jury was authorized to return a verdict for compensatory damages only if it found (a) that respondent Donaldson was in fact not dangerous to himself or others and that petitioner knew he was not,[5] (b) that Donaldson, if mentally ill, was not receiving treatment as defined by the instructions,[6] and

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[5] The court instructed the jury that to prove his claim under § 1983 the plaintiff must establish by a preponderance of the evidence that the defendants confined plaintiff "knowing that he was not mentally ill *or dangerous* or knowing that if mentally ill he was not receiving treatment for his alleged mental illness." App. 183 (emphasis added). This instruction was clarified in the instructions defining the constitutional right to treatment, quoted in full in note 9 *infra*, where the court said that absent treatment, continued confinement is unlawful "unless you should also find that the Plaintiff was dangerous *to either himself or others*." App. 186 (emphasis added).

[6] The jury was instructed that a person involuntarily civilly committed to a mental hospital had a constitutional right "to receive *such treatment as will give him a realistic opportunity to be cured or to improve his mental condition*." App. 186 (emphasis added). The court went on to observe that "the purpose of involuntary hospitalization is *treatment and not mere custodial care or punishment* if a patient is not a danger to himself or others." *Id.* (emphasis added).

that petitioner knew it,[7] and (c) that petitioner nevertheless obstructed Donaldson's release.[8] These facts alone, under the court's ruling as to the constitutional right to treatment or release,[9] rendered petitioner *prima facie* liable for damages, but the jury was further instructed to find in petitioner's favor if it found that petitioner "reasonably believed in good faith" that continued detention of Donaldson was lawful for *any* reason.[10] In

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[7] Plaintiff had to prove that defendants confined plaintiff "knowing that he was not mentally ill or dangerous or *knowing that if mentally ill he was not receiving treatment for his alleged mental illness.*" App. 183 (emphasis added).

[8] That is, the jury was instructed that plaintiff had to prove that defendants "*confined Plaintiff against his will,* knowing that he was not mentally ill or dangerous or knowing that if mentally ill he was not receiving treatment for his alleged mental illness." App. 183 (emphasis added).

[9] The court's full instruction on the constitutional right to treatment read as follows:

> "You are instructed that a person who is involuntarily civilly committed to a mental hospital does have a constitutional right to receive such treatment as will give him a realistic opportunity to be cured or to improve his mental condition.
>
> "Now, the purpose of involuntary hospitalization is treatment and not mere custodial care or punishment if a patient is not a danger to himself or others. Without such treatment there is no justification from a constitutional stand-point for continued confinement unless you should also find that the Plaintiff was dangerous to either himself or others." App. 186.

[10] "Now, the Defendants in this action have claimed and are relying on the defense that they acted in good faith. Simply put, the Defendants contend they in good faith believed it was necessary to detain Plaintiff in the Florida State Hospital for treatment for the length of time he was so confined.

"If the jury should believe from a preponderance of the evidence that the Defendants reasonably believed in good faith that detention of Plaintiff was proper for the length of time he was so confined then a verdict for Defendants should be entered even though the Jury may find the detention to have been unlawful.

[Footnote continued on page 9]

short, the jury was not permitted to hold petitioner liable merely because the so-called right to treatment had been violated; it was allowed to return a verdict against petitioner only upon a finding that petitioner had no reason *at all* for confining Donaldson that petitioner reasonably believed to be lawful. The jury did so hold, and the Court of Appeals found the evidence sufficient to support the verdict. 493 F.2d at 527; App. 294.

In addition to awarding compensatory damages, however, the jury held petitioner liable for punitive damages as well. To do so, the jury had to find, under the court's instructions,[11] that Donaldson had proved that petitioner

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[10] [Continued]

"However, mere good intentions which do not give rise to a reasonable belief that detention is lawfully required cannot justify Plaintiff's confinement in the Florida State Hospital.

"As a corollary Plaintiff here need not show malice or ill-will to prove his action under the Civil Rights Act. All that is required is that he demonstrate state action which amounts to an actual deprivation of constitutional rights or other rights guaranteed by law.

"As to this defense of good faith, the burden is upon the Defendants to prove this defense by a preponderance or a greater weight of the evidence in the case." App. 184-85.

[11] "In addition to actual damages or compensatory damages which are those I just mentioned to you, the law permits the Jury under certain circumstances to award the injured person punitive or exemplary damages in order to punish the wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.

"If the Jury should find from a preponderance of the evidence in the case that the Plaintiff is entitled to a verdict for actual or compensatory damages, and should further find that the act or omission of the Defendant or Defendants which proximately caused injury to the Plaintiff was maliciously or wantonly or oppressively done, then the Jury may, if in the exercise of discretion, they unanimously choose to do so, add to the award of actual damages such amount as the Jury shall unanimously agree to be proper as punitive and exemplary damages.

"An act or failure to act is maliciously done if prompted or accompanied by ill will, or spite, or grudge, either toward the

acted "maliciously or wantonly or oppressively" in continuing to confine him, as those terms were defined by the court. That is, the jury had to find not only that petitioner lacked what he believed to be a *good* reason for confining Donaldson, but that he continued to confine Donaldson for affirmatively *bad* reasons. Here too the Court of Appeals found the evidence sufficient to support the award. 493 F.2d at 531, App. 301.

With the case in this posture petitioner asks the Court to decide "whether, assuming there is a constitutional right to treatment, staff members at a state mental hospital are liable for monetary damages in a suit under the civil rights act," Brief at 2. That question, so phrased, suggests that the petitioner is claiming (1) that he is absolutely immune from suit under § 1983. However, the discussion in his brief shows instead that he is claiming (2) that he was held liable for lack of treatment caused by inadequate state resources for which he was not himself responsible, Brief at 52, 55-57, and (3) that he was unfairly held liable for violating a new right

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injured person individually, or toward all persons in one or more groups or categories of which the injured person is a member.

"An act or a failure to act is wantonly done if done in reckless or callous disregard of, or indifference to, the rights of one or more persons, including the injured person.

"An act or a failure to act is oppressively done if done in a way or manner which injures or damages or otherwise violates the rights of another person with unnecessary harshness or severity, as by misuse or abuse of authority or power, or by taking advantage of some weakness or disability or misfortune of another person.

". . . [T]he Jury should always bear in mind not only the conditions under which and the purposes for which the law permits an award of punitive or exemplary damages to be made, but also the requirement of the law that the amount of such extraordinary damages when awarded must be fixed with calm discretion and sound reason and must never be either awarded or fixed in amount because of any sympathy or bias or prejudice with respect to any party to the case." Appendix filed in the Court of Appeals, at 968-70.

"whose emergence and enforcement could not have been reasonably foreseen." Brief at 52. We deal below with each of these three possible grounds for attacking the decision in this case.

B. *Petitioner Does Not Contend That He is Entitled to Absolute Immunity*

As phrased in petitioner's statement of the questions presented, the question presented with respect to petitioner's individual liability for damages under 42 U.S.C. § 1983 suggests that he is contending that he is absolutely immune from liability by virtue of his official position as a staff member in a state mental hospital. Under the jury's instructions, petitioner was allowed only a qualified immunity for acts done in good faith.[12] The instruction given to the jury in that regard was a straightforward application to the facts of this case of the "reasonable good faith belief" defense which this Court enunciated with respect to state police officers making unconstitutional arrests in *Pierson* v. *Ray*, 386 U.S. 547 (1967).[13] It is consistent with the Court's subsequent ruling regarding the qualified immunity of officers of the executive branch of government in *Scheuer* v. *Rhodes*, 416 U.S. 232, 247-48 (1974),[14] and constitutes an ap-

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[12] See note 10 *supra*.

[13] "[I]f the jury found that the officers reasonably believed in good faith that the arrest was constitutional, then a verdict for the officers would follow even though the arrest was in fact unconstitutional." 386 U.S. at 557.

[14] There the Court said the following in connection with an allegation of an unnecessary deployment of the National Guard by high executive officers of a state and the resulting alleged illegal actions by that Guard:

> "These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It

propriate solution to the problem of § 1983 liability in this case. The Court of Appeals observed that petitioner had not objected to the instruction regarding the good faith belief defense in the trial court and had not raised the propriety of the instruction on appeal. The Court therefore went on, quite properly, to treat petitioner's arguments as going to the sufficiency of the evidence to support the jury's finding of an absence of good faith (493 F.2d at 527, App. 293).[15] In this Court, far from attempting to claim an absolute immunity, petitioner concedes that

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is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." 416 U.S. at 247-48.

[15] Petitioner's codefendant, Dr. Gumanis, raised on appeal the failure of the District Court to give the following instruction on "quasi-judicial" immunity, which may be construed as going to the validity of the good faith belief instruction:

> "If you find that the defendants were operating in a quasi-judicial function, in that they, under state law, were making a judgment as to whether or not plaintiff should be released, defendants are immune from liability under the Civil Rights Act." 493 F.2d at 529; App. 298.

This request was based on a line of Ninth Circuit cases holding certain state officers who exercise a "quasi-judicial" or "discretionary" function immune from liability under § 1983. See 493 F.2d at 529-30; App. 298-99.

The Court of Appeals affirmed the rejection of the proposed instruction, following previous decisions in the Second, Fifth, and Seventh Circuits in rejecting the discretionary-versus-ministerial-act distinction as a basis for absolute official immunity. 493 F.2d at 529-30; App. 299-300. It endorsed a "qualified governmental immunity" test, allowing immunity "when (1) the officer's acts were discretionary; *and* (2) the officer was acting in good faith." 493 F.2d at 530; App. 300. The instructions given to the jury were held sufficient under this test. *Id.*

All of the cases discussed by the Court of Appeals, of course, were decided prior to this Court's decision in *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974), discussed in note 14 *supra*.

> "state officers and employees are not entitled to absolute immunity accorded the judiciary, because that would frustrate the intent of . . . § 1983. However, this Court has found that there is limited immunity for acts *done in good faith by state officers*, within the scope of their official duties." Petition for Certiorari at 39 (citations omitted; emphasis added).

In light of this concession, which amici believe to be required by the Court's decisions in *Pierson* v. *Ray* and *Scheuer* v. *Rhodes*, the matter of immunity needs no further discussion.

C. *Petitioner Was Not Held Liable for a Failure to Provide Treatment Resulting from Inadequacy of State Resources for Which He Was Not Responsible*

The initial concern expressed in petitioner's brief with respect to § 1983 liability—whether a psychiatrist in a state hospital may be held liable for inadequate treatment resulting from the inadequate provision of state resources—is no more than a red herring in this case. Petitioner argues:

> "[P]sychiatrists in a state hospital should not be held liable for deprivation of a constitutional right to adequate treatment, when they have no control over the number or nature of the patients they must treat, the facilities and resources available to them, or the statutory right to either refuse to treat a particular patient or release a patient before he is restored to his mental health. The Court of Appeals found such considerations [*inter alia*] without merit." Brief at 52.

And later,

> "If the situation were not as serious as it is [in this case], it would be ludicrous to imagine a federal court finding that an over-worked, underpaid, staff psychiatrist in an over-crowded state hospital, work-

> ing with a patient-staff ratio averaging five hundred patients per physician, using the meager facilities available to him, could be held personally liable . . . to a former patient, for . . . failing to provide each and every patient with 'adequate treatment', pursuant to that right, as determined by a group of laymen." Brief at 57.

The amici on this brief—representing both professionals and staff members of state mental institutions and persons confined in those institutions—naturally share the concern that no decision of this or any other court make it impossible for the best physicians and staff to remain and work at state mental institutions—in particular those institutions which are understaffed by reason of inadequate appropriations from state legislators. These amici, certainly those that represent institutional professionals and staff, would strenuously oppose any rule that could subject such individuals to liability for conditions for which they themselves are not responsible.

It appears clear, however, that no such liability is involved in this case. Petitioner was not held liable for failing to *treat* Donaldson, but for obstructing Donaldson's *release*, knowing that Donaldson was neither dangerous nor receiving treatment. As we have explained, in Part I (A) *supra*, the instructions made it clear to the jury that the gravamen of petitioner's liability under Section 1983 was not his personal failure to provide the requisite treatment but his individual responsibility for Donaldson's continued purposeless confinement. In short, whatever the reason for Donaldson's lack of treatment, liability turned, under the jury instructions, only on petitioner's *knowledge* that Donaldson was not dangerous and not receiving treatment, combined with petitioner's obstruction of Donaldson's release. Thus, petitioner cannot contend that, because of inadequate resources he was given to work with, he could have escaped liability only

by resigning; he could have escaped liability by taking reasonable steps to secure or permit Donaldson's release, or, at the very least, by acting reasonably with respect to efforts by others to secure Donaldson's release.

Petitioner is aware of this feature of the case, and he argues that "he was not statutorily authorized to release Donaldson even though he knew that Donaldson was receiving inadequate treatment . . . ." Brief at 57. However, petitioner did not succeed in proving this contention below, and the Court of Appeals held that there was sufficient evidence that "the defendants wantonly, maliciously or oppressively blocked efforts by responsible and interested friends and organizations to have Donaldson released to their custody," outlining the evidence in that regard (493 F.2d at 515 *et seq.*, App. 271 *et seq.*). In short, it appears clear that there was evidence from which the jury could find, and did find, that petitioner had the authority to take steps which would have led to Donaldson's release and that, instead of taking those steps, or even making a good faith effort to do so, petitioner obstructed every effort that might have led to Donaldson's release.

In view of the importance amici attach to preventing physicians and other staff at inadequately funded state mental hospitals from believing that they must choose between resigning and subjecting themselves to damage actions for conditions beyond their control, we deem it appropriate to make the following additional observations. Even where the gravamen of a cause of action under Section 1983 is the failure to provide adequate treatment—rather than, as in this case, the obstruction of release—there is no case law that suggests that a defendant physician could be held liable for inadequacies in treatment that are beyond his control. Such a doctor is not merely protected by the good faith belief defense, but also by the clear requirement that plaintiff must prove that

the defendant *proximately caused* the deprivation. The jury was so instructed in this case. A physician in the tragic position of being unable to provide adequate treatment to all of the patients assigned to his care ought not and could not be held liable for attempting in good faith to make reasonable distinctions on the basis of need and the treatment he is reasonably able to provide under the circumstances.

In this particular case, there was considerable evidence of petitioner's own role in depriving Donaldson of the treatment to which he was entitled under the court's instructions; this evidence was clearly relevant to petitioner's knowledge of the conditions of Donaldson's confinement. Petitioner had ample opportunity to argue, and did so argue, that "both he and Gumanis did the best they could with available resources, and therefore should not be held personally liable for whatever was done to Donaldson." 493 F.2d at 527, App. 293. The relevant evidence has been thoroughly canvassed by the parties and the Court of Appeals. *Id.* The decisions of the courts below do not stand for the proposition that a physician in petitioner's position may be held liable for conditions he could do nothing to change.

D. *Petitioner's Remaining Claims of Unfairness Present No Important Legal Issue and Are Not Supported by the Record*

Petitioner's principal claim with respect to his liability under § 1983 is expressed in several statements that suggest that the courts below erred as a matter of law in ruling on the good faith belief defense in his case: "a psychiatrist in a state mental hospital should not be held personally liable for the deprivation of a constitutional right, whose emergence and enforcement could not have been reasonably foreseen," Brief at 52; "[petitioner] should be immune from damages in a situation

where he was acting in good faith, according to accepted institutional policy and procedures, and could not reasonably be expected to foresee the future emergence and enforcement of a constitutional right to treatment," Brief at 58; he "acted properly within the statutory and constitutional framework as it existed then," *id.*; and he should not "be penalized in retrospect for actions taken in good faith within the scope of his authority as a hospital superintendent or for judgments made as a physician." *Id.*

As we have said in Part I(B) *supra*, petitioner does not challenge the instruction on good faith that was given to the jury and did not challenge it below. Under that instruction, the jury was directed to find for defendants if it found "that the Defendants reasonably believed in good faith that detention of Plaintiff was *proper* for the length of time he was so confined." See note 10 *supra*. The court further instructed the jury that "mere good intentions which do not give rise to a reasonable belief *that detention is lawfully required* cannot justify Plaintiff's confinement," App. 184, and thus made it clear that the word "proper" meant "legally proper." Accordingly, the case went to the jury on precisely the theory that petitioner now argues to this Court. He had only to convince the jury that he reasonably believed that Donaldson's continued confinement was valid under applicable state law at the time. He failed. He does not say that he was in any way prevented from presenting to the jury whatever arguments he wished about his good faith.

Thus, petitioner's claims of unfairness do not address the legal standard embodied in the instructions and therefore must concern only the sufficiency of the evidence.[16] The difficulty with petitioner's contention in

[16] We note that lower courts have been sympathetic to the notion that such general points as petitioner makes are relevant con-

that regard, however, is that he does not say why he should be found to have acted in reasonable good faith that his conduct was legally proper. Donaldson had been committed, by the end of his confinement, not for 15 months but for 15 years. There was evidence from which the jury could have found that petitioner knew that Donaldson, even if "mentally ill," was not dangerous to himself or others; in addition, there were interested groups willing to take responsibility for Donaldson upon his release; finally, the jury could have found that petitioner knew that Donaldson was not receiving treatment likely to improve his condition and that Donaldson was being confined in conditions which were anything but therapeutic. Given all these conditions, could a psychiatrist in petitioner's position reasonably believe—or even subjectively believe—that he was acting properly in obstructing petitioner's release? The state statute under which Donaldson was confined stated that the purpose of the confinement was "care . . . and treatment".[17] If treatment was not being provided, and if less restrictive,

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siderations in testing good faith. See, *e.g.*, *Eslinger* v. *Thomas*, 476 F.2d 225, 229 (4th Cir. 1973) (official action "in unquestioned good faith and in perfect accord with long standing legal principle"); *Skinner* v. *Spellman*, 480 F.2d 539, 540 (4th Cir. 1972) ("reasonable good faith reliance on what was standard operating procedure"); *Briscoe* v. *Kusper*, 435 F.2d 1046, 1058 (7th Cir. 1970) (within the ambit of permissible discretion as it appeared at that time); *Clarke* v. *Cady*, 358 F. Supp. 1156, 1161 (W.D. Wis. 1973) (defendant "reasonably relied upon the validity of prison policies which were not in conflict with then binding authority"); *Taylor* v. *Perini*, 365 F. Supp. 557, 558 (N.D. Ohio 1972) (reliance upon "statutes, regulations or procedures which he believed were entirely proper even though some of them were unwritten"); *McKinney* v. *DeBord*, 324 F. Supp. 928, 930 (E.D. Calif. 1970) ("good faith enforcement of apparently valid rules").

We have no doubt that instructions which clarify the contours of the good faith belief defense, and relate it more specifically to the evidence in a particular case, will frequently be appropriate, if not required by law.

[17] 27 FLA. STAT. § 394.09 (1955) (repealed July 1, 1972).

but nevertheless safe, alternatives were known to be available to Donaldson, we are at a loss to understand petitioner's argument for a good faith belief that he was acting properly, and we are at a loss to understand his claim of unfairness when his conduct toward Donaldson turns out to have been a violation of constitutional law.

In *Whirl* v. *Kern*, 407 F.2d 781 (5th Cir. 1969), a sheriff had detained the plaintiff, who had been arrested and indicted for two felonies, in jail for almost nine months after the dismissal of the indictments against plaintiff; a breakdown in communications between the District Clerk's office and the Sheriff's office had occurred. The Court of Appeals held that the sheriff's ignorance was no defense to an action under § 1983 for damages for false imprisonment. It said:

> "The tort of false imprisonment is an intentional tort. . . . It is committed when a man intentionally deprives another of his liberty without the other's consent and without adequate legal justification. . . . Failure to know of a court proceeding terminating all charges against one held in custody is not, as a matter of law, adequate legal justification for an unauthorized restraint. Were the law otherwise, Whirl's nine months could easily be nine years, and those nine years, ninety-nine years, and still as a matter of law no redress would follow. The law does not hold the value of a man's freedom in such low regard." 407 F.2d at 792.

What the court in *Whirl* v. *Kern* feared, occurred, in effect, in this case. We cannot believe that the law holds Donaldson's freedom in such low regard that after 15 years confinement "for treatment," petitioner can escape liability under § 1983 when the jury found, on sufficient evidence, that he had no plausible reason whatsoever for obstructing Donaldson's release.

Finally, petitioner's arguments about good faith and unfairness seem particularly inappropriate when he has been found by the jury not just to have obstructed Donaldson's release without a reasonable good faith belief in the legality of his conduct, but to have acted "maliciously or wantonly or oppresively," as those terms were defined in the instructions on punitive damages (note 11 *supra*). The Court of Appeals found the evidence sufficient for the award of punitive damages. 493 F.2d at 531, App. 301, and, generally, at 493 F.2d at 510-18, App. 262-77. In effect, there was sufficient evidence that petitioner grossly abused his discretion and his office, obstructing Donaldson's release for reasons of personal malice since he viewed Donaldson as a trouble-maker, or, at the very least, obstructing Donaldson's release in grossly careless disregard of any legal rights that Donaldson might have had.

Such conduct on the part of a state official with authority to release someone involuntarily confined, has long been actionable under § 1983 and, indeed, under common law.[18] Even if such an official may have had a *subjective* good faith belief that his conduct would not be subject to any legal penalties, malicious, wanton or oppressive conduct is not compatible with the kind of *reasonable* good faith belief in legality which should be required to protect such a state official from liability under Section 1983, when his impression of his legal position turns out to have been incorrect.

[18] For the purposes of § 1983, such a rule follows *a fortiori* from *Whirl* v. *Kern*, 407 F.2d 781 (5th Cir. 1969), discussed *supra*. Under the common law of most states, such conduct would constitute either false imprisonment, which ordinarily does not require proof of malice, or abuse of process, which does. See generally RESTATEMENT (SECOND) OF TORTS (1965) §§ 35-45A; RESTATEMENT OF TORTS (1938) § 682; W. PROSSER, LAW OF TORTS (4th ed. 1971) § 121; 1 F. HARPER & F. JAMES, LAW OF TORTS (1956) §§ 3.6-3.9, 4.9; 35 C.J.S., *False Imprisonment* (1960); 72 C.J.S., *Process* §§ 119-24 (1951); 1 AM. JUR. 2d, *Abuse of Process* (1962); 32 AM. JUR. 2d, *False Imprisonment* (1967).

E. *Conclusion*

Petitioner's claims regarding liability for damages under § 1983 do not challenge the relevant jury instructions, which were wholly consistent with the decisions of this Court. Instead, they concern the sufficiency of the evidence to support a verdict for respondent Donaldson. These claims present no novel legal issue warranting review by this Court. In particular, petitioner's claim that the award of monetary damages in this case will put dedicated physicians at state institutions in an intolerable dilemma is not supported by the record.

II. Respondent's Continued Confinement was Unconstitutional Because He Was Not Dangerous or Incompetent and Because He Was Denied His Constitutional Right to Treatment.

Under the instructions in this case, respondent Donaldson's continued confinement by petitioner was not unlawful if Donaldson was found to have been dangerous either to himself or to others.[19] If, however, the jury found him to have been neither, they were instructed that he had a constitutional right to such treatment of his mental illness as would give him a "realistic opportunity to be cured or to improve his mental condition." [20] If he was found not to have received such treatment, his continued confinement was unlawful. Thus, by returning a verdict in favor of Donaldson, the jury necessarily found that Donaldson was not dangerous to himself or

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[19] That is, under the instructions on the elements of the § 1983 cause of action, the jury had to find that Donaldson was not dangerous and that petitioner knew it. See note 5 *supra*. The right to treatment instructions, quoted in full in note 9 *supra*, made clear that "dangerous" meant "dangerous to self or others" by saying that there was no constitutional justification for continued confinement "unless you should also find that the Plaintiff was *dangerous to either himself or others*." App. 186 (emphasis added).

[20] See notes 6 and 7 *supra*.

others, and that he was not receiving the treatment for his mental illness to which he was entitled. The Court of Appeals found the evidence sufficient to support these findings and approved the instruction on the constitutional right to treatment.[21]

The amici on this brief, intimately concerned with the rights of civilly committed persons as well as the rights of physicians and staff at state mental institutions, strongly endorse the holding of the Court of Appeals on the right to treatment. For too long the rights of civilly committed persons have received scant protection in the United States, and we welcome the recent judicial attention to this broad class of citizens.

In Parts (B) and (C) of this section of our brief, we set forth in detail the reasons why a right to treatment for civilly committed persons is required by the most fundamental notions of constitutional law. Before turning to that important question, however, we wish to call the Court's attention to a logically antecedent problem that is equally important. Donaldson claims that he could *not* be confined if he was *not* provided with treatment. It should not be assumed, however, that he *could* be confined constitutionally if he *was* provided with treatment. The jury apparently believed that Donaldson was neither dangerous to others nor incompetent to care for himself outside a confining institution, since under the trial court's instructions they could not return a verdict for Donaldson unless they found that he was not "dangerous to himself or others."[22] We think that the involuntary commitment of such a person—one who is neither dangerous to others nor incompetent reason-

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[21] See generally 493 F.2d at 510-18, App. 262-77, on the evidence; and 493 F.2d at 518-27, App. 277-93, on the propriety of the instruction on the right to treatment. Respondent's brief thoroughly canvasses the evidence in the record.

[22] See note 19 *supra*.

ably to care for himself—is *not* constitutional, whatever psychiatric difficulties he may have, and we therefore urge the Court, in dealing with Donaldson's right to treatment, to say nothing to suggest that a supposed need for treatment can justify the involuntary confinement of a person who is neither dangerous to others nor incompetent to care for himself. We set forth the basis for our view as to this matter in Part (A) of this section, after which we deal with the right to treatment itself in Parts (B) and (C) below.

A. *Persons Like Respondent Who are Neither Dangerous nor Incompetent Cannot Constitutionally be Hospitalized Against Their Will, Whether or Not They Are Given Treatment.*

As the Court of Appeals noted, there are both police power and *parens patriae* rationales for involuntary civil commitments. Three grounds for such commitments appear in the state statutes: danger to others, danger to self (which encompasses incompetency to care for oneself), and need for care or treatment.[23] The commitment of persons who are dangerous to others is ordinarily justified as an exercise of the police power.[24] The commitment of persons who are not dangerous to others but who are dangerous to themselves or unable to care for themselves and who are therefore in need of care or treatment is ordinarily justified by a *parens patriae* rationale,[25] except that where willful self-destruction is threatened, police power considerations may also be in-

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[23] 493 F.2d at 520-21, App. 280-83; *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1202-04 (1974) (hereinafter cited as "*Developments—Civil Commitment*").

[24] 493 F.2d at 521, App. 282; *Developments—Civil Commitment*, 87 HARV. L. REV. at 1223.

[25] 493 F.2d at 521, App. 282-83; *Developments—Civil Commitment*, 87 HARV. L. REV. at 1209-10.

volved.[26] However, continued involuntary hospitalization for treatment of an individual who is neither dangerous to others nor incompetent reasonably to care for himself appears to be unconstitutional under both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.

"There can no longer be any doubt that the nature of the interests involved when a person . . . [is] involuntarily committed . . . is 'one within the contemplation of the "liberty and property" language' " of the Due Process Clause of the Fourteenth Amendment.[27] As this Court has observed, civil commitment involves a "massive curtailment of liberty." [28] Donaldson was confined to the Chattahoochee facility for 15 years, and was denied freedom of movement within the hospital and liberty of the grounds during the greater part of that period. 493 F.2d at 513; App. 268. The curtailment of his liberty extended to a whole range of "fundamental" constitutionally protected interests—his basic privacy,[29] his most intimate relations,[30] his freedom of association,[31] his right to travel about,[32] and almost every aspect of his day-to-day life. As the court below stated, "The destruction of an individual's personal freedoms effected by civil commitment is scarcely less total than that effected by confinement in a penitentiary." 493 F.2d at 520; App. 280. More-

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[26] 493 F.2d at 521, App. 283; *Developments—Civil Commitment* 87 HARV. L. REV. at 1225-27.

[27] *In re Ballay*, 482 F.2d 648, 655 (D.C. Cir. 1973).

[28] *Humphrey* v. *Cady*, 405 U.S. 504, 509 (1972).

[29] See testimony quoted in 493 F.2d at 511-12, n.5, App. 264-65.

[30] See, *e.g.*, *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

[31] See, *e.g.*, *NAACP* v. *Alabama*, 357 U.S. 449, 462 (1958); *NAACP* v. *Button*, 371 U.S. 415, 430-31 (1963).

[32] See *Shapiro* v. *Thompson*, 394 U.S. 618 (1969).

over, involuntary hospitalization for mental illness may stigmatize the patient indefinitely,[33] and indefinite long-term confinement in an overcrowded, understaffed, underfunded, poorly maintained facility like Chattahoochee is likely to cause deterioration of the patient.[34]

Under this Court's decisions, such a "massive curtailment" of fundamental constitutionally protected liberties must (a) serve compelling public purposes[35] and (b) restrict liberty no more than necessary to accomplish those purposes.[36] The involuntary hospitalization for treat-

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[33] *Developments—Civil Commitment* 87 HARV. L. REV. at 1198-1201. As this Court has held, stigmatization constitutes a deprivation of liberty in the constitutional sense. *Board of Regents* v. *Roth*, 408 U.S. 564, 573 (1972). See also *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971).

[34] See Pittmen, *et al.*, Family Therapy as an Alternative to Psychiatric Hospitalization, Psychiatric Report No. 20, American Psychiatric Association (February 1966) at 188; Langsley, *et al.*, *Follow-up Evaluation of Family Crisis Therapy*, 39 AMERICAN JOURNAL OF ORTHOPSYCHIATRY (October 1969), at 753, 759; FRAZIER & CARR, INTRODUCTION TO PSYCHOPATHOLOGY (1964) at 224; Linn, *State Hospital Environmental and Rates of Patient Discharge*, 23 ARCHIVES OF GENERAL PSYCHIATRY (October 1970) at 1. See also FAIRWEATHER ET AL., COMMUNITY LIFE FOR THE MENTALLY ILL—AN ALTERNATIVE TO INSTITUTIONAL CARE (1969) at 10; Penn, Sindberg & Roberts, *The Dilemma of Involuntary Commitment*, MENTAL HYGIENE (January 1969) at 5.

[35] *Roe* v. *Wade*, 410 U.S. 113 (1973). The Court said:

> "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." 410 U.S. at 155.

Cf. In re Griffiths, 413 U.S. 717, 721-22 and n. 9 (1973).

[36] *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594-96 (1962) (for a valid exercise of the police power, the means employed must be "reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.") See *Roe* v. *Wade*, *supra* note 35; *Kesselbrenner* v. *Anonymous*, 33 N.Y.2d 161, 305 N.E.2d 903, 350 N.Y.S.2d 889 (1973) (statute permitting transfer of patient from hospital under control of department of mental

ment of an individual who (a) is not dangerous and (b) does not lack the capacity reasonably to care for himself and make his own treatment decisions meets neither test.

No substantial, much less compelling, public interest is served by forcing such an individual to submit to treatment against his will, certainly no purpose sufficient to justify the massive curtailment of liberty entailed by involuntary hospitalization. That is true whether the state's police power or its role as *parens patriae* is thought to be invoked. The state's police power may empower it to compel a Jehovah's Witness to submit to a blood transfusion where her *life* is at stake,[37] although there is impressive authority that even then a competent individual's refusal to be treated is "strictly a private concern and thus beyond the reach of all governmental power." [38] So, too, the police power may justify requiring an individual to act in a way that is thought to serve his health and welfare, as by refraining from the

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hygiene to hospital primarily for confinement of mentally ill convicted criminals held unconstitutional; "[t]o subject a person to a greater deprivation of personal liberty than necessary to achieve the purpose for which he is being confined is . . . violative of due process," *id.* at 165, 305 N.E.2d at 905, 350 N.Y.S.2d at 892). See also lower court authorities cited in *Developments—Civil Commitment*, 87 HARV. L. REV. at 1328-29 n.49. The least restrictive alternative analysis is discussed in Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1108 (1972), and Wormuth & Mirken, *The Doctrine of Reasonable Alternatives*, 9 UTAH L. REV. 254 (1964).

[37] *Application of President and Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir.) (single-judge), *rehearing denied*, 331 F.2d 1010, *cert. denied*, 377 U.S. 978 (1964).

[38] See *In re Estate of Brooks*, 32 Ill. 2d 361, 205 N.E.2d 435 (1965). The words quoted in the text are from *Application of President and Directors of Georgetown College, Inc., supra*, 331 F.2d at 1015, 1016 (separate opinion of Burger, J., concurring in denial of petition for rehearing *en banc* for want of a justiciable controversy).

use of narcotics,[39] as long as the restriction on individual freedom of action is relatively small. The police power might even justify encroachment on constitutionally protected interests, as in the involuntary vaccination of persons whose religious beliefs do not permit them to consent, if the encroachment is slight and the protection of other persons is at stake.[40] But, when neither life nor safety of others is involved, as in the case of a harmless mentally ill individual who is not incompetent, there is no police power interest in treatment sufficient to justify the massive curtailment of liberty involved in indefinite involuntary hospitalization. The *parens patriae* power provides no better justification. That power historically extended to "persons who had lost their intellects and became . . . incompetent to take care of themselves." [41] But the reason for the power—the inability of incompetents to make their own decisions as to their needs—has no application to those numerous individuals who are not incompetent even though they suffer from what may be termed a "mental illness." [42] Many such

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[39] *E.g.*, *Commonwealth* v. *Leis*, 355 Mass. 189, 243 N.E.2d 898 (1969).

[40] See *Jacobson* v. *Mass.*, 197 U.S. 11 (1905); *Winters* v. *Miller*, 464 F.2d 65, 70 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971). *But cf. Canterbury* v. *Spence*, 464 F.2d 772, 780 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

[41] *Developments—Civil Commitment*, 87 HARV. L. REV. at 1208 n. 41, citing *In re Barker*, 2 Johns Ch. 232, 236 (N.Y. 1816), citing in turn *Beverley's Case*, 4 Co. Rep. 123b, 127a-28a, 76 Eng. Rep. 1118, 1125-26 (K.B. 1603); 1 W. BLACKSTONE, COMMENTARIES *304.

[42] *Developments—Civil Commitment*, 87 HARV. L. REV. at 1212-1219. We note, in addition, that an individual's *own* competency to care for himself should not be the sole consideration. Relatives or friends may prove willing and able to provide adequate care and supervision of a mentally ill individual. In Donaldson's own case, an old friend made repeated offers to care for Donaldson, 493 F.2d at 516-17, App. 272-75. Initial or continued confinement in such cases is not justifiable unless the State can demonstrate good reason for believing or fearing that release to another's care or custody will not adequately protect the individual.

people can and do lead lives of the utmost productivity outside of confining institutions.

Accordingly, fundamental notions of due process of law compel the conclusion that a non-dangerous mentally ill person who is not incompetent reasonably to care for himself cannot be required to submit to continued hospitalization for treatment, however "adequate" that treatment may be.[43]

The same conclusion is required as a matter of equal protection. Civil commitment statutes authorize different treatment of the mentally ill and the physically ill by requiring mentally ill persons to submit to hospitalization for treatment while allowing physically ill persons to decide such questions for themselves. Mentally ill persons, however, may be as capable of evaluating the desirability of medical treatment and hospitalization as persons who are physically ill. Therefore, there is no rational basis for the discrimination involved in the commitment of non-dangerous mentally ill persons who are not incompetent reasonably to care for themselves and make their own treatment decisions. The discrimination clearly does not serve a *compelling* governmental interest and therefore cannot withstand the strict scrutiny required where, as here, curtailment of fundamental constitutionally protected rights is involved,[44] and where the discrimination involves a "suspect class"—the mentally ill—under criteria previously outlined by this Court.[45]

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[43] See *Lessard* v. *Schmidt*, 349 F. Supp. 1078, 1094 (E.D. Wis. 1972) (three-judge court), *vacated & remanded on other grounds*, 414 U.S. 473 (1974).

[44] *San Antonio Indep. School Dist.* v. *Rodriguez*, 411 U.S. 1, 29-34 (1973); *Dunn* v. *Blumstein*, 405 U.S. 330, 336-42 (1972).

[45] In *San Antonio Indep. School Dist.* v. *Rodriguez*, 411 U.S. 1, 28 (1973), this Court identified "the traditional indicia of suspectness"—whether the class is "saddled with such disabilities or subject to such a history of purposefully unequal treatment or

relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." The mentally ill, particularly those who are institutionalized, meet all three of those criteria. Their disabilities render them politically impotent; indeed, they are frequently disenfranchised altogether. They have been subjected historically to purposefully unequal treatment *vis-à-vis* persons who are not mentally ill. And they have been relegated to a position of political powerlessness by disenfranchisement and other means. This has been true to so great an extent that the history of conditions in state institutions for the mentally impaired cries out for protection from the gross neglect that has been imposed for so long by the majoritarian political process.

These conditions are exposed by the record in this case and the records in numerous pending cases concerning institutional conditions. *E.g., Wyatt* v. *Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part sub nom. Wyatt* v. *Aderholt*, No. 72-2634 (5th Cir. 1974); *New York State Association for Retarded Children* v. *Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973); *Welsch* v. *Likins*, 373 F. Supp. 487 (D. Minn. 1974). For example, in *Wyatt*, Alabama's principal facility for the mentally retarded had been evaluated by the amicus AAMD several years before the commencement of the *Wyatt* litigation. The evaluators identified numerous conditions that were incompatible with even the most primitive notions of ordinary human decency. For example, evaluators found that in a ward of ambulatory severely retarded young boys: "Ground food was brought to the day room in a very large aluminum bowl along with nine metal plates and nine mental spoons. Nine working residents were sent in to feed these 54 young boys from this one bowl of food and nine plates and nine spoons. The feeding was accomplished in a total state of confusion. Since there were no accommodations to even sit down to eat, it was impossible to tell which residents had been fed and which had not been fed with this system." Evaluation at 11-12.

The conditions of gross neglect identified by the AAMD had not been corrected several years later when the *Wyatt* litigation was instituted. Indeed, as Judge Johnson found, conditions in the facility endangered life itself. Thus, shortly before the filing of suit four residents died due to understaffing, lack of supervision and brutality. One had a garden hose inserted in his rectum for five minutes by a working inmate who was cleaning him; one died when a fellow inmate hosed him with scalding water; another died when soapy water was forced into his mouth; and the last died by a self-administered overdose of drugs which had been inadequately secured. Transcript of Hearing, February 28-March 1, 1972, at 99, 101-02, 104, 126-27.

[Footnote continued on page 30]

In view of the jury's apparent conclusion that Donaldson was neither dangerous to others nor incompetent, Donaldson's continued detention for treatment thus appears to have been unconstitutional even if treatment was available for him. If we are right about that, the instruction that Donaldson was entitled to release if he was not receiving treatment was overly favorable to petitioner; the jury could have been instructed simply that if Donaldson was neither dangerous to others nor incompetent and petitioner knew it, then the continued confinement was unlawful; in that event petitioner would be liable for obstructing Donaldson's release, subject to the Court's further instructions on the good faith belief defense. Since the parties did not explore this issue in the courts below and have not briefed it here, this is not an appropriate case in which to decide whether the involuntary hospitalization of a person who is neither dangerous to others nor incompetent is unconstitutional. But if the involuntary hospitalization of such an individual is unconstitutional, as we believe, then the ques-

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[45] [Continued]

Conditions in the state's facilities for the mentally ill were no better. The state's own consultant found that "wards are overcrowded, most frequently without even a minimum of privacy for the patients. For the most part there are no partitions between the stools in the bathroom and no individual furniture where patients could keep clothing. Many of the living areas are essentially large dormitories with 40 to 50 or 60 beds placed row on row (it impressed me as a depressing and dehumanizing environment, reminding me of graveyard lots where the patients are essentially living out their lives without the rights of privacy (or ownership))." Consultant Report of Dr. William Tarnower, (Exhibit X of Defendants' Report to the Court dated September 23, 1971 at 1).

The records in these cases confirm the existence of conditions today that shock the conscience yet have existed for years, demonstrating the political impotence of this unfortunate group of human beings.

See generally, Note, *Mental Illness: A Suspect Classification?*, 83 YALE L.J. 1237 (1974).

tion whether confined persons like Donaldson have a right to release if they are not treated does not arise. That is, the question whether there is a right to release in the absence of treatment, the question petitioner asks this Court to decide, is tendered in this case in connection with persons who are entitled to release without regard to treatment. Since certiorari has been granted, however, on a petition which raises the issue, and since amici strongly endorse the right to treatment with respect to those who are constitutionally confined, we discuss the right to treatment question in the remainder of this brief.

B. *Persons Committed for Mental Impairments Have a Constitutional Right to Treatment*

As we have seen, the case directly presents only the question whether a mentally ill person who has been civilly committed but who is not dangerous to himself or others has a right to treatment or release.[46] It therefore involves a person as to whom the only conceivable ground for detention is the need for treatment—a person who is subject to commitment, if at all, only under the *parens patriae* power.

In this particular case, the relevant state statute explicitly set out the purpose for civil commitment and for the "massive curtailment" of fundamental liberties that such commitment entails: respondent Donaldson was committed for "care, custody *and treatment.*" [47] Since the jury necessarily found that Donaldson was dangerous neither to himself nor to others, there is no rational way to avoid the conclusion that Donaldson was entitled to treatment or release under the rule of *Jackson* v. *Indiana*, 406 U.S. 715 (1972). There the Court held: "At

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[46] See pp. 21-22 *supra*.

[47] 27 FLA. STAT. § 394.09 (1955) (repealed July 1, 1972).

the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." 406 U.S. at 738. As Judge Johnson said in *Wyatt* v. *Stickney*,[48] the Alabama minimum institutional standards case, "To deprive any citizen of his or her liberty on the altruistic theory that confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process." 325 F. Supp. at 785. Accordingly, the Court of Appeals below correctly ruled: "If the 'purpose' of commitment is treatment, and treatment is not provided, then the 'nature' of the commitment bears no 'reasonable relation' to its 'purpose', and the constitutional rule of *Jackson* is violated." 493 F.2d at 521; App. 283.

While this ground is dispositive of Donaldson's case, and the case of any person who is confined for treatment and found to be neither dangerous nor receiving sufficient treatment to justify prolonged confinement, amici believe it is clear that *all* persons who are civilly committed for mental impairments have a constitutional right to treatment as the term was defined by the Court of Appeals,[49] whether they are mentally ill or mentally

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[48] 325 F. Supp. 781, 334 F. Supp. 1341 (M.D. Ala. 1971), 344 F. Supp. 373 & 387 (M.D. Ala. 1972), *aff'd in part sub nom. Wyatt* v. *Aderholt*, No. 72-2634 (5th Cir. Nov. 8, 1974).

[49] The Court of Appeals held

> "that a person involuntarily civilly committed to a state mental hospital has a constitutional right to receive such individual treatment as will give him a reasonable opportunity to be cured or to improve his mental condition." 493 F.2d at 520; App. 280.

It later elaborated on the standard, in terms more directly applicable to the mentally retarded: "rehabilitative treatment, or, where rehabilitation is impossible, minimally adequate habilitation and care, beyond the subsistence level custodial care that would be provided in a penitentiary." 493 F.2d at 522; App. 284. See also *Wyatt* v. *Stickney*, *supra*, 344 F. Supp. at 390, where the court

retarded; whether they are harmless or dangerous; and whether they are committed under the *parens patriae* power or the police power. The right derives from the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and from Eighth Amendment principles that are applicable to the states under the Fourteenth Amendment. Amici endorse this more general principle for at least four reasons:

1. Without treatment, involuntary hospitalization in a so-called mental hospital does not differ in any material way from penal imprisonment. "Absent treatment, the hospital is transformed into a 'penitentiary where one could be held indefinitely for no convicted offense.'" [50] The conditions of Donaldson's own confinement—locked wards, padlocked windows, severe restrictions on movement within the hospital, assigned tasks of menial labor, confinement with criminal patients, the absence of privacy [51]—make this point in a particularly vivid way. Thus, commitment without treatment is simply imprisonment for a mental impairment and therefore cannot be squared with Eighth Amendment requirements embodied in the Fourteenth Amendment. As this Court said in *Robinson* v. *California*, 370 U.S. 660 (1962):

> "It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the victims of these and other human afflictions be dealt with by compulsory treatment,

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said that mentally retarded patients have a constitutional right to "such individual habilitation as will give each of them a realistic opportunity to lead a more useful and meaningful life and to return to society."

[50] *Wyatt* v. *Stickney*, *supra*, 325 F. Supp. at 781.

[51] See Donaldson's testimony below, App. 40-51; quoted in part in 493 F.2d at 511-12 n.5, App. 264-65.

> involving quarantine, confinement or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." 370 U.S. at 666.

These requirements cannot be evaded by adopting sham treatment programs—by the "hanging of a new sign reading 'hospital' over one wing of the jailhouse." *Powell* v. *Texas*, 392 U.S. 514, 529 (1968).

2. Moreover, mentally ill persons who are believed to be dangerous are imprisoned indefinitely, sometimes upon a mere prediction by a physician as to possible future conduct. In contrast, we do not imprison beyond the terms of their sentences persons who are *not* mentally ill, who have *demonstrated* that they are capable of violence by actually committing serious crimes. Even then, they are confined only after conviction pursuant to rigorous procedural safeguards. This discrimination demands strict scrutiny under the Equal Protection Clause,[52] because the mentally ill are a "suspect" class, and "fundamental" interests are at stake.[53] The discrimination against mentally ill persons who *may* be dangerous, *vis-à-vis* sane persons who have *proved* their capacity for violence, serves no rational end whatever, much less a compelling one.

3. Additionally, since confinement without treatment does not differ materially from penal confinement, commitment without observing procedures required as a matter of due process in criminal cases violates the Due Process Clause directly. As the Court below pointed out,[54]

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[52] See Part II(A) *supra*.

[53] See note 45 *supra*.

[54] 493 F.2d at 521-22; App. 283-84.

long-term detention is, as a matter of due process, generally allowed only when an individual is (1) proved to have committed a specific offense (2) in a proceeding subject to the rigorous procedural requirements of the Bill of Rights and the Due Process Clause. Even then, his confinement is ordinarily allowed only for a fixed period of time limited by statute and set in his sentence. These limitations are not observed in civil commitments. Thus, Donaldson was committed indefinitely upon the certification of two physicians that they believed that he needed restraint "to prevent him from self injury or violence to others." [55] If preventive detention in such circumstances can be justified at all, it is only because treatment is to be provided, rendering confinement nonpunitive in character.

4. Finally, unless treatment is provided, indefinite confinement is not likely to cure the illness that is the occasion for confinement. Rather, it is likely to lead to further deterioration, thereby prolonging confinement indefinitely. A number of studies by these amici and others document that conclusion.[56] Thus, confinement without treatment is not the least restrictive alternative available for protecting society from dangerous mentally ill persons and therefore cannot be squared with the due process requirement that the State cannot restrict fundamental liberty except in ways *necessary* to accomplish compelling public objectives.[57]

For these reasons, non-penal confinement of mentally impaired individuals without treatment is unconstitutional. Treatment is the necessary element that distinguishes civil confinement from mere imprisonment, thus

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[55] See App. 189.

[56] See authorities cited in note 34 *supra*.

[57] See 27 FLA. STAT. § 394.22(11)(a) (1955) (repealed July 1, 1972); App. 249.

avoiding the constitutional difficulties outlined immediately above. In these circumstances, it is not surprising that an impressive body of precedent has developed, summarized by the Court below, 493 F.2d at 521-25, App. 283-89, supporting the conclusion that treatment is the necessary *quid pro quo* for the "massive curtailment of liberty" that results from civil commitment. There are decisions supporting the view that treatment is required in each of the major forms of non-penal facilities operated by the states—those for the mentally ill,[58] the mentally retarded,[59] non-delinquent juveniles in need of supervision,[60] juvenile delinquents,[61] and facilities for persons confined under "non-penal" sex-offender and defective delinquent statutes.[62] Surely if sex-offenders and defective delinquents have a right to treatment, mentally ill and retarded persons have no lesser rights.

C. *The Right to Treatment is Not Nonjusticable for Lack of Judicially Manageable Standards*

Petitioner's principal attack on the right to treatment is his claim that it is not susceptible of judicial definition and enforcement. (Brief at 29-45.) He notes that there are many matters over which mental health pro-

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[58] *Wyatt* v. *Stickney*, *supra* note 48; *Stachulak* v. *Coughlin*, 364 F.2d 686 (N.D. Ill. 1973).

[59] *Wyatt* v. *Stickney*, *supra*; *Welsch* v. *Likins*, 373 F. Supp. 487 (D. Minn. 1974). *But see*, *New York State Ass'n for Retarded Children, Inc.* v. *Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973).

[60] *Martarella* v. *Kelley*, 349 F. Supp. 575, *enforced*, 359 F. Supp. 478 (S.D.N.Y. 1972). See also *In re Gault*, 387 U.S. 1, 22 n.30 (1967).

[61] *Nelson* v. *Heyne*, 491 F.2d 352 (7th Cir. 1974), *affirming* 355 F. Supp. 451 (N.D. Ind. 1972); *Inmates of Boys' Training School* v. *Affleck*, 364 F. Supp. 1354 (D.R.I. 1972); *Morales* v. *Turman*, 364 F. Supp. 166 (E.D. Tex. 1973).

[62] *Sas* v. *Maryland*, 334 F.2d 506 (4th Cir. 1964); *Davy* v. *Sullivan*, 354 F. Supp. 1320 (M.D. Ala. 1973) (three-judge court).

fessionals disagree and many recognized forms of therapy available for different mental impairments, and concludes that enforcement of the right to treatment will require judges and juries "to second guess the judgment of trained physicians and psychologists concerning what constitutes 'adequate treatment.'" (Brief 30.)

By "right to treatment," the court below meant the right to such treatment as will give the patient "a reasonable opportunity to be cured or to improve his mental condition," or "where rehabilitative treatment is impossible, minimally adequate habilitation and care, beyond the subsistence level custodial care that would be provided in a penitentiary." 493 F.2d at 520-522, App. 280-84.[63] These are meaningful and enforceable standards. As long as the hospital and its staff provide services to cure or improve the condition of the patient that are within the range of accepted professional practice, the patient is receiving the treatment to which he is entitled. While there are questions on which mental health professionals disagree, as in other fields of medicine, there are also matters on which there is consensus. For example, all responsible professionals would agree that when the ratio of psychiatrists and psychologists to patients falls below a certain fraction at an institution, proper treatment of any but a small number of patients is impossible.[64] All responsible professionals would agree that the "milieu" of Chattahoochee described in the record[65] was for the most part anti-therapeutic in character. All responsible professionals would agree that without individual treatment plans of some sort, extended confine-

[63] See also note 49 *supra*.

[64] The minimally acceptable ratio, it should be noted, will depend on the type of treatment that the institution purports to offer. Some behavior modification plans may require fewer administering staff than, say, psychotherapy.

[65] See testimony quoted in 493 F.2d at 511-12, n.5, App. 264-65.

ment at Chattahoochee, given the character of the facility shown by the record, would hinder, rather than help, patients to recover.

The amici in this case can speak to this issue with authority. They include organizations of mental health professionals who have been extremely active for years in the establishment and administration of minimum professional standards for treatment, in and out of institutions.

The Joint Commission on Accreditation of Hospitals ("JCAH"), established by the American Medical Association, American Hospital Association, American College of Physicians, and American College of Surgeons, has organized Accreditation Councils responsible for setting minimum standards for both psychiatric facilities and facilities for the mentally retarded and evaluating such facilities. The Council on Accreditation of Psychiatric Facilities consists of most of the major organizations in this field, including the American Association on Mental Deficiency ("AAMD"), one of these amici, and the American Psychiatric Association, which is filing a separate amicus brief. The Council on Accreditation of Facilities for the Mentally Retarded includes three of these amici—AAMD, the American Psychological Association, and the National Association for Retarded Citizens —and also includes the American Psychiatric Association. These Accreditation Councils have published extensive standards for facilities for both the mentally ill [66] and the retarded,[67] the fruit of massive studies funded by HEW and the National Institute of Mental Health and years of experience evaluating institutional facilities and

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[66] JCAH, ACCREDITATION MANUAL FOR PSYCHIATRIC FACILITIES (1972).

[67] JCAH, STANDARDS FOR RESIDENTIAL FACILITIES FOR MENTALLY RETARDED (1971).

programs.[68] The Accreditation Councils have teams of skilled evaluators engaged in the evaluation of these facilities for accreditation purposes. In addition, with the assistance of such organizations, the federal government has promulgated detailed minimum standards for facilities for the mentally retarded.[69] Moreover, the American Psychological Association, one of these amici, and the American Psychiatric Association have each published standards for care and treatment,[70] and they and other amici have published a number of position paper regarding the matter.[71]

Thus, the amici have had an enormous amount of experience in both the definition and the application of standards of treatment. It simply is not true that the right to treatment designed to cure or improve mental impairments is not susceptible to definition and enforcement. There are points of controversy, to be sure, but it is possible to mark out the uncontroversial minimum standards of acceptable professional practice with a considerable degree of precision.

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[68] AAMD evaluated facilities for the mentally retarded from 1964 to 1971 and, along with other amici, continues to supply experts for JCAH evaluations.

[69] 39 Fed. Reg. 2219 (Jan. 17, 1974, effective March 18, 1974), *amending* 45 C.F.R. ch. II (Intermediate Care Facility Services). See especially 39 Fed. Reg. at 2226 *et seq.* (45 C.F.R. § 249.13).

[70] AMERICAN PSYCHOLOGICAL ASSOCIATION, STANDARDS FOR PROVIDERS OF PSYCHOLOGICAL SERVICES (1974); AMERICAN PSYCHIATRIC ASSOCIATION, STANDARDS FOR PSYCHIATRIC FACILITIES (1974).

[71] *E.g.*, American Psychiatric Association Task Force on the Right to Care and Treatment, Position Paper on the Right to Adequate Care and Treatment for the Mentally Ill and Mentally Retarded (December 1974); American Psychiatric Association, *Position Paper on Involuntary Hospitalization of the Mentally Ill*, 130 AMERICAN JOURNAL OF PSYCHIATRY 3 (1973); National Association for Mental Health, Position Statement on the Right to Treatment (1970).

Obviously, courts should not be in the business of prescribing specific treatment for individual patients. But as has been noted elsewhere: [12]

> "[T]wo types of judicially manageable standards for the right to treatment have been developed. These standards, while calculated to ensure that the patient will receive adequate treatment, do not require a court to prescribe individualized therapeutic programs. The first type of standard pertains to institutional conditions; the court sets out basic minima applicable to all patients and necessary for any recovery of mental health. The second type of standard pertains to individual treatment programs; instead of itself prescribing therapies, however, the court, employing a scope of review similar to that used in reviewing administrative agency actions, examines a hospital's medical decisions to decide whether the expertise of the psychiatric profession has been properly utilized in a particular case and an *arguably* appropriate therapy prescribed." (Emphasis added.)

The first type of standard—minimum institutional standards—is illustrated by *Wyatt* v. *Stickney*.[13] In that case, which concerned treatment in Alabama institutions for both the mentally ill and the retarded, the district court found that three fundamental institutional conditions are prerequisites for adequate and effective individual therapy: (1) a "humane psychological and physical environment," (2) qualified staff "in numbers sufficient to administer adequate treatment," and (3)

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[12] *Developments—Civil Commitment*, 87 HARV. L. REV. at 1337.

[13] 325 F. Supp. 781, 334 F. Supp. 1341 (M.D. Ala. 1971), 344 F. Supp. 373 & 387 (M.D. Ala. 1972), *aff'd in part sub nom. Wyatt* v. *Aderholt*, No. 72-2634 (5th Cir. Nov. 8, 1974).

"individualized treatment plans". 334 F. Supp. at 1343.[74] There is no responsible objection to these three fundamental standards, and there is a considerable degree of professional consensus regarding their detailed application.[75] In setting detailed standards implementing these three fundamental institutional prerequisites to treatment, the court was able to draw on the extensive experience of these amici in the establishment and administration of standards. With the aid of amici, the plaintiffs and the defendants were able to stipulate to

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[74] *Accord, Welsch* v. *Likins*, 373 F. Supp. 487 (D. Minn. 1974), involving residential facilities for the mentally retarded in Minnesota.

[75] *Developments—Civil Commitment*, 87 HARV. L. REV. at 1337-41:

"The *Wyatt* court, recognizing that the milieu of the hospital can have detrimental rather than beneficial effects on the patient's mental health, found that humane conditions had to exist for hospitalization to be truly therapeutic. Standards for these conditions were reflected in the court's comprehensive order, which directed the hospitals to recognize patients' rights, *inter alia*, to enjoy privacy and dignity, to be free from physical restraint and isolation unless necessitated by emergency, to wear their own clothes, to keep personal posssesions, to be outdoors at regular and frequent intervals, to participate in religious worship, and to have suitable opportunities for social contact with the opposite sex. The hospitals were also ordered to provide certain physical conveniences such as a minimum amount of floor space per patient and a maximum ratio of patients to lavatory facilities.

"The *Wyatt* order also reflected the belief that minimum staff-to-patient ratios were indispensable for adequate treatment. The court's standards were thus detailed and comprehensive . . . .

" . . . .

"As a final element of minimum institutional standards, the *Wyatt* injunction ordered that individual treatment plans be maintained for each patient. Such plans require the institution to focus its attention more precisely on the patients as individuals, rather than to rely on the commonly articulated theory that the mere presence of the patient in the 'therapeutic environment' of a mental hospital constitutes a 'milieu therapy.' . . ."

proper minimum standards to a considerable degree."[16] Where the plaintiffs and the defendants could not agree, the court could draw upon the considerable experience of the organizations representing the relevant professional disciplines in marking the outer boundaries of acceptable professional practice. Thus, there simply is no basis for the claim that it is not possible for a court to establish minimum institutional standards for adequate treatment.

Review of individual treatment does not present any greater difficulty. In the case now before the Court there was ample evidence that Donaldson received no treatment that could be considered adequate on any reasonable standard.[17] Thus, this case does not present any question as to standards with respect to the adequacy of individual treatment. We note, however, that courts have developed methods of reviewing individual treatment which do not require the court to engage in psychiatric evaluation and prescription. Thus, in *Tribby* v. *Cameron*, 379 F.2d 104 (D.C. Cir. 1966), the court held that it

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[16] Memorandum of Agreement of Plaintiffs, Defendants and Amici Curiae American Orthopsychiatric Association, American Psychological Association and American Civil Liberties Union, filed Feb. 2, 1972, in *Wyatt* v. *Stickney*, Civ. Action No. 3195-N, M.D. Ala., N. Div'n.

[17] Respondent demonstrates in his brief the hollowness of petitioner's claim (Brief at 10) that Donaldson participated in milieu therapy, religious therapy, and recreational therapy. In spite of the criticisms that milieu therapy has evoked, see Halpern, *A Practicing Lawyer Views the Right to Treatment*, 57 GEO. L.J. 782, 786-87 (1969), amici acknowledge that milieu therapy is indeed a recognized form of therapy. Any therapy whose principal theme is inaction, however, is properly scrutinized by courts to ensure that "benign neglect" has not turned into simple neglect. Milieu therapy must be carefully designed with reference to the individual patient, and an attending physician should be keeping records and making frequent observations to ensure that the therapy is continuing to be a reasonable treatment plan. None of these precautions was taken in Donaldson's case.

could review an allegation that a mental institution was not providing the petitioner with any treatment, stating:

> "We do not suggest that the court should or can decide what particular treatment this patient requires. . . . We do not decide whether the [institution] has made the best decision, but only make sure that it has made a permissible and reasonable decision in view of the relevant information and within a broad range of discretion." 379 F.2d at 105.

In *Williams* v. *Robinson*, 432 F.2d 637 (D.C. Cir. 1970), in which the petitioner sought to be placed in a less restrictive ward in a mental institution, the court indicated that while deference is due to administrative discretion, the court does have a duty to insure "that the hospital's expertise was actually brought into play." *Id.* at 641. As pointed out elsewhere, a court should not

> "interfere with the discretion of a hospital as long as the court could be convinced that the hospital was performing its duties by utilizing its expertise in the treatment of each patient. It thus appears that the judicial responsibility to adjudicate right to treatment claims can be reconciled with a court's desire to avoid possibly harmful judgments about the proper treatment to be provided mentally ill individuals." [78]

Thus, there is no danger that the right to treatment will require judges and juries "to second guess the judgment of trained physicians and psychologists concerning what constitutes 'adequate treatment'" (Petitioner's Brief at 30) any more than in convential malpractice cases in which courts and juries are not permitted to second guess professionals on matters as to which competent professionals may disagree, but instead are permitted

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[78] *Developments—Civil Commitment*, 87 HARV. L. REV. at 1343-44.

only to predicate liability on departures from accepted professional practice.[79] Indeed, in damage cases under Section 1983, defendants are doubly protected because of the availability of the defense of good faith.[80] In view of that defense, individual liability for damages under Section 1983 will be *more* restricted than in conventional malpractice actions for improper treatment, brought under state law. In short, there is no basis whatever for the claim that the right to treatment is not capable of judicial definition and enforcement.

D. *Conclusion*

Amici strongly endorse the conclusion that in this case the jury was properly instructed that Donaldson, if not dangerous to himself or to others, had a constitutional right to treatment or release. In addition, amici believe that all involuntarily committed patients at state mental institutions, whether mentally ill or mentally retarded, whether dangerous or not, have a constitutional right to treatment as defined by the Court of Appeals below. The right to treatment may appropriately be administered by courts, with the aid of published standards and expert opinion on what constitutes minimally adequate treatment, beyond mere care and custody.

In addition, amici urge the Court not to assume or suggest that Donaldson would have been constitutionally confined had he been receiving proper treatment, and hope that the Court will expressly reserve the substantial constitutional question of the permissibility of committing individuals who are dangerous neither to themselves nor others and who can reasonably care for themselves outside an institution.

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[79] See, *e.g.*, 1 D. LOUISELL & H. WILLIAMS, MEDICAL MALPRACTICE (1973) §§ 8.04-.06; R. SLOVENKO, PSYCHIATRY AND LAW (1973) 395 *et seq.*

[80] See Part I *supra*.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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FRANCIS M. SHEA
RALPH J. MOORE, JR.
JOHN TOWNSEND RICH
734 Fifteenth Street, N.W.
Washington, D.C. 20005

Attorneys for Amici Curiae

MARCIA PEARCE BURGDORF
1238 North Eddy Street
South Bend, Indiana 46617

Attorney for the National Center for Law and the Handicapped and the National Association for Retarded Citizens

JAMES F. FITZPATRICK
1229 Nineteenth Street, N.W.
Washington, D.C. 20036

Attorney for the American Psychological Association

KURT W. MELCHIOR
One Embarcadero Center
San Francisco, Calif. 94111

HARRY J. RUBIN
P.O. Box 72
York, Pennsylvania 17405

Attorneys for the National Association for Mental Health

SHERIDAN L. NEIMARK
Munsey Building
Washington, D.C. 20004

Attorney for the National Society for Autistic Children

BEVERLEY ROWAN
1701 K Street, N.W.
Washington, D.C. 20036

Attorney for the Joseph P. Kennedy, Jr., Foundation

A. L. ZWERDLING
1211 Connecticut Avenue, N.W.
Washington, D.C. 20036

General Counsel, American Federation of State, County & Municipal Employees, AFL-CIO

HEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

f Counsel